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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ON REARGUMENT

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QUESTIONS PRESENTED

"[W]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), should be reconsidered?"

The parties previously briefed and argued the following two questions:

"1. Whether *National League of Cities* v. *Usery* . . . bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* [1982] ("FLSA") to the operations of San Antonio Metropolitian Transit Authority because it is performing an integral operation in an area of traditional governmental functions?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?"

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BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ON REARGUMENT

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

This case results from a lawsuit filed by San Antonio Metropolitan Transit Authority ("SAMTA") seeking a declaratory judgment that the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA") are inapplicable to its operations under the decision in *National League of Cities* v.

Usery, 426 U.S. 833 (1976). On February 18, 1983, the district court entered summary judgment in favor of SAMTA and intervenor American Public Transit Association ("APTA"). The federal government and intervenor Joe Garcia[1] appealed directly to the Supreme Court, and the parties briefed and argued the two issues raised by the appeal. By Order entered July 5, 1984, the Court restored these consolidated cases to the calendar for reargument and requested the parties to brief and argue the question "[w]hether or not the principles of the Tenth Amendment as set forth in *National League* . . . should be reconsidered."

In its supplemental brief (p. 2), the Government endorses the Commerce Clause limitation in *National League* as being "sound and enduring constitutional doctrine . . . [which] is the necessary consequence of the federal structure of our constitutional system and fits comfortably within the context of this Court's decisions on other aspects of federal-state relations." The Government agrees that "the decision in *National League of Cities* manifests the 'essential role of the States in our federal system of government' " (br. 9) and then demonstrates that federalism, and its necessary limiting effect on the Commerce Clause, are a long-standing part of our constitutional jurisprudence. Although confirming the validity of the holding in *National League*, the Government renews its contention that the test for determining whether an activity is "traditional" should be "essentially, if not exclusively, an historical one." Gov't br. 17.

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[1] SAMTA originally opposed Garcia's intervention because, among other reasons, Section 16(b) of the FLSA, 29 U.S.C. § 216(b)(1982), extinguishes the right of any employee "to become a party plaintiff " to any action in which the Secretary has filed a complaint seeking to restrain further delay in payment of unpaid minimum wages or overtime compensation. See Plaintiff's Response in Opposition to Joe G. Garcia's Motion To Intervene, filed in the district court on April 23, 1980. The Government filed a counterclaim against SAMTA to restrain any further withholding of unpaid overtime compensation on February 1, 1980, which was more than two months before Garcia moved to intervene. Garcia's standing as an intervenor is accordingly not free of doubt.

Disagreeing with the Government, intervenor Garcia argues that "Congress' commerce clause power is not subject to *any* constitutional limits derived from state sovereignty" and that the reasoning in *National League* is faulty and should be overruled. Garcia br. 33-34 (emphasis added). Alternatively (br. 35-46), Garcia asserts that *National League* should be limited to "the making and enforcement of laws" and should not apply to political subdivisions of the States.

This brief is divided into two major parts. Part I concurs with the Government's position that principles of federalism, which pervade the fabric of the Constitution and are affirmatively stated in the Tenth Amendment, limit the scope of the federal commerce power when the States are regulated as States. Contrary to Garcia's flawed analysis of the historical underpinnings of our federalism, SAMTA shows that the writings of the Founders, as well as decisions of this Court which served as precursors to *National League*, and those which followed it, acknowledge federalism restraints on the Commerce Clause.

The second part of this brief is divided into three sections. First, SAMTA demonstrates that in *National League* the Court correctly applied principles of federalism by balancing the federal and state interests and holding that the FLSA's wage and hour provisions cannot be applied to most state and local government employees. Second, SAMTA shows that the Government's proposed historical test, and Garcia's claim that *National League* should be limited to law enforcement, draw no support from any decision of this Court and are aberrant notions, totally at odds with the well-documented principle that under the Constitution the States must have flexibility to respond to the evolving needs of their citizens. Third, SAMTA refutes Garcia's contention that *National League* should be inapplicable to local government, as being simply not supported by the decisions of this Court and disregarding the reality that the great majority of governmental services are provided by political subdivisions of the States.

Since SAMTA previously filed an extensive brief which demonstrates (1) that it is performing an integral operation in

an area of traditional governmental functions within the meaning of *National League* and (2) that the FLSA cannot be applied to *any* state or local government employees absent a constitutionally valid amendment, SAMTA has not rebriefed its position on those points, but instead respectfully refers the Court to its earlier brief.

ARGUMENT

I. The Holding in *National League*—That the Federal Government's Regulation of States as States Is Limited by Principles of Federalism and the Tenth Amendment—Is Consistent with the Founders' Intentions and Decisions of This Court Spanning More Than 150 Years.

In *National League*, the Court stated that it "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art I of the Constitution." 426 U.S. at 842. Garcia now contends that the Court's statement was patently erroneous and that it is clear from *The Federalist* and other indications from the Founders, as well as decisions from this Court, that there are no limitations on Commerce Clause regulation of the States as States. As shown below, Garcia's one-sided analysis is palpably erroneous.

A. *The Federalist* and Other Writings of the Founders Support the Holding in *National League*.

The Founders' clearest statement of federalism and state sovereignty is found in James Madison's frequently quoted essay in *Federalist No. 45:*

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which,

> in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

Id. at 313 (J. Cooke ed. 1961). Madison clearly envisioned distinct limits on the federal government's power to infringe on the States' broad authority over their internal affairs. This principle is echoed in other *Federalist* essays by Madison: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere" (*No. 39*, at 256); "The States [are] regarded as distinct and independent sovereigns . . . by the Constitution proposed" (*No. 40*, at 261); "The States will retain under the proposed Constitution a very extensive portion of active sovereignty" (*No. 45*, at 310).[2]

The records regarding the Constitutional Convention affirm the federalism ideal that is our heritage. For example, Madison observed that the term "United States" was substituted for "National" "to guard against a mistake or misrepresentation of what was intended." III *The Records of the Federal Convention of 1787*, at 474-75 (M. Farrand ed. 1911) (hereinafter "*Farrand*"). C. Haines, in *The Role of the Supreme Court in American Government and Politics 1789-1835*, at 105-06 (1944), noted that "even the nationalistically inclined members of the Convention, such as James Wilson, asserted that it was not the intention of the Convention to destroy the sovereignty of the States." According to III *Farrand* 144, Wilson stated:

> [W]hen gentlemen assert that it was the intention of the federal convention to destroy the sovereignty of the States, they must conceive themselves better qualified to judge of the intention of that body than its own members, of whom not one, I believe, entertained so improper an idea.

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[2] *See also No. 59*, at 399-400 (Hamilton) ("Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments?").

Madison himself wrote that an object of the convention was "to draw a line of demarcation which would give the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them." III *Farrand* 132.[3]

Preservation of state sovereignty was uppermost in the Framers' minds. No one entertained any thought that the federal government could regulate the internal concerns of the States, operating as States, without limitation under the Commerce Clause. In *Federalist No. 45*, Madison reflected on the fact that the States had few, if any, concerns regarding the new federal power to regulate commerce:

> The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.

Id. at 314.

Had the Founders had any idea that the Commerce Clause bestowed unlimited authority to regulate the States as States, there would have been a major confrontation over the issue, and the Constitution probably would never have been pro-

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[3] *See also* W. Willoughby, *The Constitutional Law of the United States* vol. I at 111 (2d ed. 1929): "The Constitution looks to a preservation of the several States and the administrative autonomy that is allotted to them, and from this is deduced the principle that the Federal Government may not, unless it be absolutely necessary to its own efficiency, interfere with the free operation of State governments by way either of imposing upon them the performance of duties, or of unduly restraining their freedom of action by way of taxation or otherwise."

posed.[4] The apparent dearth of opposition and controversy over the Commerce Clause among the Founders is probably due in large part to the very limited purpose for which the power was to be enacted (which may account for the implication from Madison's statement above that the regulation of commerce was not one of the "more considerable powers"). Felix Frankfurter, in his treatise on *The Commerce Clause under Marshall, Taney & Waite* 12-13 (1937), highlighted the narrow purpose for the Commerce Clause:

> The records disclose no constructive criticisms by the States of the Commerce Clause as proposed to them . . . . The conception that the mere grant of the commerce power to Congress dislodged state power finds no expression . . . . It was an authorization to remove those commercial obstructions and harassments to which the militant new free states subjected one another, and to enable the community of the states to present a united commercial front to the world . . . .

The statements of the Founders support Justice Frankfurter's observations. Madison stated (III *Farrand* 478):

> [I]t is very certain that [the power to regulate commerce among the several States] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, *rather than as a power to be used for the positive purposes of the General Government* . . . . [emphasis added]

The same observation is confirmed in *Federalist No. 42*, at 283, where Madison stated that "a very material object of [the power to regulate commerce among the several states] was the relief of the States which import and export through other States, from the improper contributions levied on them by the

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[4] *Cf. EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1077 (1983) (Powell, J., dissenting): "It is impossible to believe that the Constitution would have been recommended by the Convention, much less ratified, if it had been understood that the Commerce Clause embodied the national government's 'central mission,' a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments."

latter.").[5] *See generally* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 465, 471-81 (1941) (documenting the purpose of the Commerce Clause).

Two truths emerge from *The Federalist* and the other debates and writings chronicled above: First, the Founders unmistakably intended to preserve the sovereignty of the States in our fledgling nation. Second, they had no idea that the Commerce Clause would give the new federal government unlimited regulatory authority over internal commerce of the States, much less over the States as States.

Before discussing relevant Supreme Court precedents, it should be noted that the Founders envisioned the passage of a Bill of Rights that would include an amendment affirmatively preserving the sovereign rights of the States. *See* Casto, *The*

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[5] The limited purpose for the Commerce Clause has been recognized by this Court. *E.g.*, *South-Central Timber Dev., Inc.* v. *Wunnicke*, 104 S. Ct. 2237, 2242 (1984) ("[T]he Commerce Clause was designed 'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.' "); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States."); *Mobile County* v. *Kimball*, 102 U.S. 691, 697 (1880) ("[I]t is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.").

The limited scope of the Commerce Clause with respect to commerce among the States is also reflected in decisions acknowledging that the federal power to regulate foreign commerce is broader. *E.g.*, *South-Central Timber Dev., Inc.*, 104 S. Ct. at 2247 ("It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."); *Japan Line, Ltd.* v. *Los Angeles County*, 441 U.S. 434, 448 (1979) ("Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be greater."); *Board of Trustees* v. *United States*, 289 U.S. 48, 57 (1933) ("The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.").

Doctrinal Development of the Tenth Amendment, 57 W. Va. L.Q. 227, 230-31, 248 (1949). In *Federalist No. 84*, at 578, Hamilton, although feeling a bill of rights was not needed, specifically presaged the fact that such a declaration of rights "under our constitution must be intended as limitations of the power to the government itself." *See also* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 138 (J. Elliot 2d ed. 1896) ("*Debates*") (Spencer) (a "bill of rights . . . would keep the states from being swallowed up by a consolidated government"). The importance of the Tenth Amendment to the formation of our Nation is evidenced by the fact that all eight states that proposed amendments at the first Congress in 1789 recommended a provision reserving powers to the States, and no other amendment was proposed by as many states. II B. Schwartz, *The Bill of Rights: A Documentary History* 983, 1167 (1971).

B. The Principles of *National League* Are Supported by Supreme Court Precedent.

From our Nation's beginnings, this Court has had an almost unbroken line of cases recognizing that the States must be permitted to function within their spheres as sovereigns free from the tentacles of the Commerce Clause. Although in the depression era this Court began to reconsider earlier Commerce Clause principles that had limited regulation of the private sector, the Court, with one errant dictum exception,[6] has never retreated from the fundamental premise that principles of federalism protect the States from unjustified federal intrusion into their reserved realm. This part of the brief highlights some of these decisions, demonstrates that the handful of Supreme Court cases that have addressed Congress' regulation of the States as States are consistent with *National League*, and shows that the Tenth Amendment is not a meaningless appendage to the Bill of Rights.

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[6] *United States* v. *California*, 297 U.S. 175 (1936), discussed *infra* pp. 14-15.

One of the most frequently cited Commerce Clause cases is *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although that case emphasized the broad scope of the commerce power, it is consistent with *National League*. In *Gibbons*, the Court held that the power to regulate commerce "acknowledges no limitations, *other than are prescribed in the constitution.*" *Id.* at 196 (emphasis added). The Court gave dimension to its recognition that the Constitution restricts the commerce power when it acknowledged that the enumeration in the Commerce Clause "presupposes something not enumerated . . . the exclusively internal commerce of the state," which "may be considered as reserved for the state itself." *Id.* at 195.

Thirteen years later, in *Mayor of New York City* v. *Miln*, 36 U.S. (11 Pet.) 102 (1837), the Court again addressed the subject of federalism in a Commerce Clause context and concluded that the following are "impregnable positions":

> [T]hat a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation . . . are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.

Id. at 139. Although the holding in *Miln* has undergone a metamorphosis in modern decisions acknowledging that even purely intrastate and seemingly de minimus transactions in the private sector may affect commerce and be regulated under the Commerce Clause, it nevertheless forms part of our constitutional heritage and shows how the Court then viewed the parameters of the Commerce Clause.

Throughout the remainder of the Nineteenth Century, the Court continued to emphasize the role of federalism as a limit on the commerce power in our constitutional scheme. *E.g.*, *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 13 (1895); *Habeas Corpus Cases*, 100 U.S. 371, 394 (1879); *United States* v. *DeWitt*, 76 U.S. (9 Wall.) 41, 44 (1869); *License Cases*, 46 U.S. (5 How.) 504, 574, 588 (1847). Federalism restraints on the tax power also became evident during this era, which, although since modified to apply only to direct taxation of the States, continues to this very day.[7] This doctrine was foreshadowed in *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71 (1869), where the Court stated:

> [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.
>
> . . . .
>
> [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. . . .

Id. at 76.

The dawn of the Twentieth Century saw continued statements from this Court underscoring our federalism and its relation to the federal commerce power. *See, e.g.*, *Employers' Liability Cases*, 207 U.S. 463, 502-03 (1908) (quoted *infra* p. 26); *see also South Carolina* v. *United States*, 199 U.S. 437, 451-52 (1905) ("Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government . . . . In other words, the two governments, National and state, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers . . . .").

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[7] A discussion of the tax immunity cases, and their support of similar restrictions on the Commerce Clause, is contained in Part I(C) of this brief, *infra* p. 19.

In the 1930's, the Court's respect for federalism continued to be evident. For example, in *United States* v. *Butler*, 297 U.S. 1 (1936), the Court stated:

> Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that *any power* granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible states,") might be served by obliterating the constituent members of the Union.

Id. at 77 (emphasis added). Similar statements appeared in *Brush* v. *Commissioner*, 300 U.S. 352, 364 (1937) and *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 78 (1938).

In 1936, the Court began an era of deference to acts of Congress regulating the means of production in the private sector. In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld the National Labor Relations Act. The Court emphasized, however, that it was not abandoning the concept of federalism carefully embodied in the Constitution by the Founders:

> Undoubtedly, the scope of [the commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.

Id. at 37. Subsequently, in *United States* v. *Darby*, 312 U.S. 100 (1941), the Court sustained the FLSA, which like the NLRA applied only to the private sector.[8]

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[8] Although the Court opined that the Tenth Amendment "states but a truism," *id.* at 124—a statement disavowed in *National League* and which this brief (*infra* pp. 17-19) shows to be unsound—the Court acknowledged

Although the decision in *Darby* apparently marked the end of the private sector's ability to rely on concepts of federalism to avoid federal Commerce Clause regulation, federalism was far from dead. *See, e.g., H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525, 533-34 (1949) ("desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs . . . . There was no desire to authorize federal interference with social conditions or legal institutions of the states."); *Duckworth* v. *Arkansas*, 314 U.S. 390, 394 (1941).

Just five years before *National League* was decided, the Court reemphasized the preeminent role of federalism in the abstention case of *Younger* v. *Harris*, 401 U.S. 37, 44-45 (1971):

> The National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . . It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

The cases discussed above dealt with the role of federalism in the private sector. Although Garcia cites a handful of pre-*National League* commerce or war power cases in which a state or local government was a party, they do not support Garcia's claim that federal commerce power over the States is limitless. With the exception of *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which *National League* expressly overruled, all of these cases involved instrumentalities (railroads, rivers, lakes or commercial water terminals) forming an integral part of interstate or foreign commerce, or they dealt with federal legislation directed at the national emergencies of war or inflation.

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that the only regulations of commerce within the plenary power of the Commerce Clause are those "which do not infringe some constitutional prohibition . . . ." 312 U.S. at 115.

The first such case—which, significantly, did not come until 137 years after our Nation was formed—was *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925). There, the United States sued to enjoin diversion of water from Lake Michigan in excess of the amount authorized by the Secretary of War. The Government claimed that diversion would affect the levels of the Great Lakes and connecting rivers and obstruct interstate navigation. The Court noted that the case also involved the federal government's treaty obligations to a foreign power, as well as obstructions to foreign commerce, *id.* at 425, which is subject to greater federal regulation than is commerce among the States (see n.5, *supra*). The Court did not hold that the Commerce Clause was unlimited, but instead balanced the federal and state interests, finding the federal interest in interstate navigation and foreign commerce to be paramount.

Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941) also dealt with the need for uniform federal control over interstate navigation. In that case, Oklahoma challenged a federal law permitting the United States to build a dam and reservoir on the river that formed the boundary between Texas and Oklahoma. In upholding the law, the Court noted that the project was "part of a comprehensive flood-control program for the Mississippi itself" and that Congress was "protecting the nation's arteries of commerce through control of the watersheds." *Id.* at 525. The case did not involve federal regulation of the States' sovereign functions. In fact, the opinion was written by Justice Douglas, who dissented in *Maryland* v. *Wirtz*.

The Supreme Court has also upheld Commerce Clause regulation of publicly owned water terminals and railroads, which were essential components of interstate or foreign commerce. In the *Railroad Cases*,[9] the Court sustained application of federal statutes to state-owned railroads. Despite the dic-

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[9] *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936).

tum in *United States* v. *California* regarding the scope of commerce power over the States, all three cases dealt with state activities that were part of the interstate rail network, which was singled out for special treatment in *UTU* v. *Long Island Rail Road*, 455 U.S. 678 (1982). In *California* v. *Taylor*, 353 U.S. at 566, the Court stressed that the railroad in question was "a vital link in the National transportation system." In *United States* v. *California*, 297 U.S. at 182, the Court emphasized that the railroad "serves as a link in the through transportation of interstate freight . . . ."

In *California* v. *United States*, 330 U.S. 577 (1944), the Court sustained application of a statute to state-owned terminals along the commercial waterfront in San Francisco. In validating the statute, the Court relied on the fact that the terminals were "an essential part of interstate and foreign trade." *Id.* at 586. Thus, not only were the terminals a direct instrumentality of interstate commerce, but they were being regulated under Congress' admittedly unlimited power to regulate foreign commerce.

Case v. *Bowles*, 327 U.S. 92 (1946), also relied upon by Garcia, was not a Commerce Clause case, but arose under the war power, which is one of the federal government's most formidable powers, as shown by the following excerpt from *Federalist No. 45* (Madison):

> The operations of the Federal Government will be most extensive and important in times of war and danger; those of the State Governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State Governments will here enjoy another advantage over the Federal Government.

Id. at 313. Furthermore, the legislation in *Bowles* was temporary.

In *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court sustained the enterprise concept of FLSA coverage enacted by Congress in 1961[10] and also validated extension of the FLSA to

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[10] The lynchpin of the enterprise concept is set out in section 3(s) of the Act, 29 U.S.C. § 203(s)(1982), which defines the term "enterprise engaged in commerce or in the production of goods for commerce," which in turn estab-

public schools and hospitals. Notwithstanding its ruling, however, the Court left its door ajar for future federalism challenges to Commerce Clause regulation directed at the States when it stated that "[t]he Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' " *Id.* at 196.

Seven years later, in *Fry* v. *United States*, 421 U.S. 542 (1975), the Court made clear that the States may be protected from federal commerce regulation that improperly impairs their reserved sovereign authority. The Court stated:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," [quoting *United States* v. *Darby*], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

421 U.S. at 547 n.7. Although the Court upheld application of the Economic Stabilization Act to the States, its reasoning and approach are consistent with the later decision in *National League*. Unlike the FLSA, the Stabilization Act was temporary, having expired shortly after the Court granted certiorari. 421 U.S. at 549 (Douglas, J.). Furthermore, the Act was in response to a national emergency caused by rampant inflation, and, as noted in *National League* (426 U.S. at 853), it had minimal impact on the States. Careful review of the *Fry*

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lishes the prerequisites for enterprise coverage by the Act's minimum wage and overtime provisions. The statutory definition of this phrase specifically includes enterprises having "employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person." Section 3(s)(6), enacted in 1974, includes all such employees if they work for a public agency—*i.e.*, state or local government. This broad test of enterprise coverage would encompass virtually all public employees, since it would be hard to imagine any employee in this modern age who does not "handl[e] . . . or otherwise work[ ] on goods or materials" that have moved in commerce. Even state legislators "handle" pencils that have crossed state lines.

opinion suggests that the Court had anticipated the balancing test mentioned by Justice Blackmun in *National League* and, after balancing the federal interest to be advanced by the Stabilization Act against the States' interest in being free from its operation, decided that the interest of the federal government was greater.

The statement in *Fry* about the Tenth Amendment was not novel exposition and, unlike the "truism" comment in *Darby*, it was faithful to the constitutional scheme. Over 150 years before *Fry*, the Court stated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), that the "10th Amendment . . . leav[es] the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument." The Court thus acknowledged that the Tenth Amendment is not without meaning and also laid the framework for the development of a constitutional doctrine of federalism based upon the fabric of the entire Constitution rather than the Tenth Amendment alone.

The Tenth Amendment's vitality is also evident from other cases. In *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920), Justice Holmes referred to "invisible radiation from the general terms of the Tenth Amendment . . . ." In *McCray* v. *United States*, 195 U.S. 27, 61 (1904), the Court concluded that "undoubtedly, both the Fifth and Tenth Amendments qualify . . . all the provisions of the Constitution . . . ." In *Kansas* v. *Colorado*, 206 U.S. 46, 90-91 (1907), the Court emphasized that "[t]his Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning." *See also United States* v. *Butler*, 297 U.S. 1, 68 (1936).

The Tenth Amendment is one of only twenty-six amendments enacted in almost 200 years. To relegate it to a useless and meaningless appendage would contravene sound principles of constitutional construction dating back to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). There, Chief

Justice Marshall stated that "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect . . . ." *Accord, Wright* v. *United States*, 302 U.S. 583, 588 (1938); *see also Ullmann* v. *United States*, 350 U.S. 422, 428-29 (1956) ("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."); Casto, *The Doctrinal Development of the Tenth Amendment*, 57 W. Va. L. Q. 227, 228-29 (1949) (also noting that later-enacted provisions to the Constitution prevail as implied modifications of former provisions).

The principle that the Tenth Amendment modifies the Commerce Clause is supported by cases holding that other amendments in the Bill of Rights affirmatively limit the commerce power. *National League* cited cases under the Fifth and Sixth Amendments to this effect. 426 U.S. at 841. Only last term, in *FCC* v. *League of Women Voters*, 104 S.Ct. 3106 (1984), this Court struck down a federal ban on editorializing by noncommercial educational stations. The Court held that the statute, even though based on the Commerce Clause, violated the First Amendment. The Court ruled that because "broadcasters are engaged in a vital and independent form of communicative activity, . . . the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *Id.* at 3116. The activities of state and local governments in providing essential services to their citizens are even more "vital and independent," and therefore the Tenth Amendment must also "inform and give shape to the manner in which Congress exercises its regulatory power" over the States. *See also Fry* v. *United States*, 421 U.S. at 553 (Rehnquist, J. dissenting) ("[A]n individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground that it infringes his rights under, say, the First or Fifth Amendment, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress. That the latter claim is of greater force, and may succeed when the former will fail, is well established.").

Even if there were no Tenth Amendment, the validity of *National League* would be unaffected, since the principles of federalism implicit in the Constitution singularly limit the Commerce Clause when Congress attempts to regulate the States as States.[11] For example, in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 406, 421, the Court stressed that federalism disputes "depend on a fair construction of the whole" Constitution and that federal laws must be consistent with the "spirit of the constitution." Justice Blackmun eloquently stated this principle in his dissenting opinion in *Nevada* v. *Hall*, 440 U.S. 410 (1979):

> I would find that source [for Nevada's sovereign immunity] not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism. The Court has had no difficulty in implying the guarantee of freedom of association in the First Amendment . . . and it has had no difficulty in implying a right of interstate travel . . . .
>
> I have no difficulty in accepting the same argument for the existence of a constitutional doctrine of interstate sovereign immunity. . . . The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention. . . . *It is, for me, significantly fundamental to our federal structure to have implicit constitutional dimension.*

Id. at 430 (emphasis added); *cf. Roe* v. *Wade*, 410 U.S. 113, 152-54 (1973) (tracing the history of the right of privacy as implicit or at least having "roots" in various amendments to the Constitution).

C. *National League* Is Supported by the Tax Immunity Decisions.

Since at least 1870, when *Collector* v. *Day*, 78 U.S. (11 Wall.) 113, was decided, this Court has recognized that Congress' constitutional tax power is subject to federalism limitations. In

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[11] Furthermore, the Tenth Amendment, regardless of its substantive meaning, ensured that the federal judiciary would have full authority to review and overturn improper federal encroachments on the States. *See* E. Corwin, *Court Over Constitution* 54-55 (1957).

National League (426 U.S. at 843-44), the Court drew analogous support for its holding from the tax immunity cases. These cases are derived from the same principles of federalism articulated in *National League*, and they buttress the Court's holding in that case.

This principle of federalism was cogently expressed in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931), as follows:

> It is an established principle of our constitutional system of dual government . . . that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective sphere and from the provisions of the Constitution which look to the maintenance of the dual system.

Although the decisions that invalidated federal income taxation of employees and agents of state and local governments were overruled in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939),[12] the federalism limitation on federal taxation of the States as States continued. *Graves* made clear that it was only overruling the tax immunity principle as applied to the private sector: "where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed." 306 U.S. at 483. Seven years later, in *New York* v. *United States*, 326 U.S. 572 (1946), six justices (four concurring and two dissenting) affirmed that the tax immunity doctrine remained viable as

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[12] At page 29 of his brief, Garcia maintains that "the *only* federal taxes Congress has ever enacted that this Court has found to be unduly intrusive on state sovereignty were taxes on the income of state employees . . . ." This statement is inaccurate. In *Indian Motocycle*, the Court invalidated an excise tax on a motorcycle bought by a city. *See also Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (invalidating net income and excess profits tax on corporate oil and gas lease income); *National Life Ins. Co.* v. *United States*, 277 U.S. 508 (1928) (invalidating tax on municipal bonds held by insurance companies).

applied to the States as States: "a federal tax which is not discriminatory . . . may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." 326 U.S. at 587 (Stone, C. J., concurring). *See also South Carolina* v. *Regan*, 104 S. Ct. 1107 (1984), in which the Court recently asserted original jurisdiction in a suit filed by South Carolina challenging the constitutionality of a federal tax law.

The tax immunity cases are directly apposite to the holding in *National League*. Both powers are found in the same article of the Constitution, and except for a restriction on taxing exports, there are no explicit constitutional limitations on the federal power to tax, just as there are none on the power to regulate commerce. This was emphasized by Justice Frankfurter in *New York* v. *United States*, 326 U.S. at 575:

> By its terms the Constitution has placed only one limitation on [the federal tax] power . . .: Congress can lay no tax "on Articles exported from any State." Art. I, § 9. Barring only exports, the power of Congress to tax "reaches every subject."

Justice Frankfurter then equated the tax power and commerce power by proclaiming that "[s]urely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce." *Id.* at 582. *See also McCray* v. *United States*, 195 U.S. 27, 61 (1904) ("The right of Congress to tax within its delegated power [is] unrestrained, except as limited by the Constitution . . . .").

In *United States* v. *Baltimore & Ohio Railroad*, 84 U.S. (17 Wall.) 322 (1872), the Court stated that if the agencies and instrumentalities of the States "may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed . . . ." *Id.* at 327-28. The same admonition applies to Commerce Clause regulation of the States, which due to its now virtually limitless scope may

impede, and possibly even destroy, the essential functions of state and local government.[13]

D. The Holding in *National League* Has Been Consistently Reaffirmed in Subsequent Supreme Court Decisions.

This Court has repeatedly acknowledged the continued vitality of the *National League* doctrine and has reaffirmed its guiding principle that Congress does not have unlimited power to apply the Commerce Clause to the States as States.

In *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), the Court, through Justice Marshall, reaffirmed *National League* and established a three-pronged test for determining whether a Commerce Clause statute violates principles of federalism. *Id.* at 286-93. The Court rejected a Tenth Amendment challenge to the federal statute under scrutiny because "in contrast to the situation in *National League*, the statute at issue regulates only 'individual businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside.' " *Id.* at 293 (quoting *National League*). In the companion case of *Hodel* v. *Indiana*, 452 U.S. 314 (1981), the Court, again speaking through Justice Marshall, upheld the same federal statute against a Tenth Amendment challenge, emphasizing that the statute regulated "private individuals and businesses" rather than "the States as States," and concluded that "[t]his Court's decision in *National League of Cities* simply is not applicable . . . ." 452 U.S. at 330.

In *UTU* v. *Long Island Rail Road*, 455 U.S. 678 (1982) ("*LIRR*"), the Court, in an opinion by Chief Justice Burger, upheld application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce. The entire decision was premised upon the continued viability of *National League*, which the Chief Justice characterized as meaning "that under most circumstances federal power to regulate commerce could

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[13] The tax immunity rationale has also been applied to the bankruptcy power. *See Ashton* v. *Cameron County Water Improv. Dist. No. 1*, 298 U.S. 513, 532 (1936).

not be exercised in such a manner as to undermine the role of the states in our federal system." *Id.* at 686.[14]

In *FERC* v. *Mississippi*, 456 U.S. 742 (1982), in an opinion by Justice Blackmun, the Court denied a Tenth Amendment challenge to a federal statute that imposed requirements on the States with respect to the regulation of utilities. The majority opinion "acknowledge[d] that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty [quoting *National League*] . . . [and that] having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 761. The opinion also confirmed the continued validity of *National League* and the Tenth Amendment. *Id.* at 763, 769, 770 nn.28, 32, 33. Justice Powell's opinion, concurring in part and dissenting in part, noted that "as the structure of the Court's opinion today makes plain . . ., the Commerce Clause and the Tenth Amendment embody distinct limitations on federal power." *Id.* at 773.

In *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), the Court, in an opinion by Justice Brennan, held that "the Age Discrimination in Employment Act ["ADEA"] does not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.' " *Id.* at 1062.[15] In reaching

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[14] As shown in SAMTA's opening brief (pp. 17-29), publicly owned mass transit systems are entitled to *National League* immunity since, unlike railroads, transit is not part of a national transportation network requiring uniform regulation, transit has not been subject to comprehensive and long-standing federal regulation but instead has been traditionally regulated by the States, and state and local government are the principal providers of transit—furnishing 94% of all transit services. Furthermore, unlike the railroad in *LIRR*, which had operated under the Railway Labor Act for 13 years without objection, SAMTA never acceded to FLSA coverage.

[15] Although not relying on the Fourteenth Amendment as a basis for its ruling in *Wyoming*, the Court has consistently held that the States enjoy no federalism immunity from federal discrimination legislation passed pursuant to that Amendment. *E.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 178-79 (1980); *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 690 n.54 (1978); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

this conclusion, the Court underscored the validity of the holding in *National League*. The majority stated that "some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment." *Id.* at 1061 n.11. The Court referred to the "wide-ranging and profound threat to the structure of State governance" portended by the FLSA in *National League* and distinguished the ADEA on the ground that comparable interference was lacking in the case before it. *Id.* at 1062-63. The Chief Justice, in a dissenting opinion joined by Justices Powell, Rehnquist and O'Connor, summarized the import of *National League*, *Hodel* and *LIRR*: "The wisdom to be drawn from these cases is that Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment." *Id.* at 1069. *See also White* v. *Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042, 1051 (1983) (Blackmun, J., concurring and dissenting) (quoted p. 31 *infra*); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.10 (1980) ("[c]onsiderations of sovereignty independently dictate that marketplace actions involving 'integral operations in areas of traditional governmental functions'—such as the employment of certain state workers—may not be subject even to congressional regulation pursuant to the commerce power"); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 15 (1977) ("[A] State 'continues to possess authority to safeguard the vital interests of its people.' ").

The foregoing cases demonstrate that in the eight years following *National League* this Court has continued to apply the principles of *National League*, refining and clarifying them as it encountered new situations, and that acceptance of Garcia's assertion that there are no federalism limits on the Commerce Clause would constitute a remarkable about-face by the Court.

E. An Unlimited Commerce Power Is a Formula for Destruction of the States as Governing Authorities in Modern Society.

In 1790, three years after the States ratified the new Constitution, our nation was an agrarian society in which 95% of the population lived in rural areas. Bureau of Census, U.S. Dep't of Commerce, *Historical Statistics of the United States, Colonial Times to 1970*, ser. A 57-72, at 12 (1975) ("*Historical Statistics*"). The predominantly rural nature of America continued through the Nineteenth Century and into the early 1900's, when urbanization finally took hold.[16] In 1980, 74% of the population were urban dwellers. Bureau of Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1984*, at 27, tab. 26 (1983) ("*Statistical Abstract 1984*").

With the urbanization of America and the technological innovations that have overcome the vast distances separating our states and cities, has come the realization that what affects commerce in the Twentieth Century is far removed from the early days when the horse and buggy predominated. Concurrently, this Court has so significantly expanded the Commerce Clause in the private sector that today practically any activity, no matter how local or confined, is within the reach of the federal commerce power. Any doubt about this proposition is dispelled by *Wickard* v. *Filburn*, 317 U.S. 111 (1942), in which the Court held that wheat grown by a farmer for consumption on his farm was subject to a federal quota system enacted under the Commerce Clause. *See also Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).[17]

In view of the broad reading that Congress and this Court now give to the Commerce Clause, practically any activity

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[16] In 1850, 85% of Americans still lived in rural areas, *Historical Statistics*, ser. A 57-72, at 12, and by 1900, the figure was still 60%, *id.* at 11. By 1920, the figure had dropped to 50% and by 1940 to 40%. *Id.*

[17] That Congress construes its Commerce Clause authority as being boundless and touching the most local of activities is evident from the 1974 amendments to the FLSA which extended that Act to persons "employed in domestic service in a household." 29 U.S.C § 206(f) (1982).

performed by the States and any decision made by the States could be found by Congress to affect commerce and subjected to federal regulation. If the commerce power were not limited by the Tenth Amendment and principles of federalism, the States would be "downgrad[ed] . . . to a role comparable to the departments of France, governed entirely out of the national capitol." *Elrod* v. *Burns*, 427 U.S. 347, 375 (1976) (Burger, C. J., dissenting). With such unlimited authority, Congress could dictate to the States how many policemen should be on the streets of our cities, and what type of shoes they should wear. It could tell the States what materials to use in building their capitols; it could decree the number of fire stations and their locations; it could dictate the routes that urban transportation systems must traverse and their hours of operation. The list could go on indefinitely. Such a scenario is beyond the wildest imaginings of the Founders or any decision of this Court.

Such plenary and potentially destructive exercise of federal regulation of the States as States would be unprecedented. In *United States* v. *Butler*, 297 U.S. 1, 77 (1936), the Court said:

> The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.

Similar concerns were voiced in the *Employers' Liability Cases*, 207 U.S. 463, 502-03 (1908):

> It is apparent if the contention [that to engage in interstate commerce is a privilege available only on conditions Congress prescribes] were well founded, it would extend power of Congress to every conceivable subject, however inherently local, would obliterate all the limita-

> tions of power imposed by the Constitution and would destroy the authority of the States as to all conceivable matters which from the beginning have been and must continue to be, under their control so long as the Constitution endures.[18]

"There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If the Commerce Clause were unlimited, the federal government, through regulation, could foreclose much experimentation, and many states might refrain from trying novel approaches for fear that Congress would obliterate the fruits of their labor in the name of the Commerce Clause. *See also* Institute for Studies in Federalism, *Essays in Federalism* 13 (1961) ("[M]ost of the so-called 'new' policies of the federal government had been tested and sifted at state and local levels. Without the autonomy of states and without, in the states, substantial local freedom, such controlled experimentation could not exist.").

As noted in SAMTA's opening brief (at pp. 29-33), this Court has treated the Constitution as a living document with flexibility to adapt to new situations. "The great clauses of the Constitution are to be considered in the light of our whole experience, and not merely as they would be interpreted by its Framers in the conditions and with the outlook of their time." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 15-16 (1977). Consistent with this principle, the Court has upheld Commerce Clause legislation that was undoubtedly beyond the contemplation of the Founders, and thereby gave that power

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[18] *See also EEOC* v. *Wyoming*, 103 S. Ct. at 1081 (Powell, J., dissenting) (under view that commerce power is unlimited, "it is not easy to think of any state function—however sovereign—that could not be preempted"); *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) ("power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government into a central government of unrestrained authority over every inch of the whole Nation").

meaning commensurate with realities of the Twentieth Century. Since principles of federalism and the Tenth Amendment also form a part of the Constitution, they must be interpreted and applied consistent with the same realities. Justice Holmes emphasized this point in *Missouri* v. *Holland*, 252 U.S. 416 (1920):

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in light of what was said a hundred years ago. . . . *We must consider what this country has become in deciding what [the Tenth] Amendment has reserved.*

Id. at 433-34 (emphasis added). This principle is also evident from Hamilton's comments in *Federalist No. 34*, at 210, that "Constitutions of civil Government are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages, according to the natural and tried course of human affairs."

The United States today is a highly industrialized, highly urbanized country. The States, and particularly the cities and other local government units, constantly encounter new problems, as well as new versions and degrees of old problems, while their citizens demand more and more services that are unavailable privately. As public revenues fail to keep up with needs, state and local governments are called upon more and more frequently to devise new solutions to their problems. This is "what this country has become," and this is what must be considered in construing the Tenth Amendment and principles of federalism. In this modern age, where state and local governments are the domestic lifeblood for hundreds, if not thousands, of diverse urban centers with their own peculiar

needs, it is unthinkable that the Commerce Clause could be used to regulate the States as States without limitation.[19]

II. The Court in *National League* Correctly Held That the FLSA Cannot Be Applied to State and Local Government Employees Engaged in Integral Operations in Areas of Traditional Governmental Functions.

A. The Court, in Balancing the Federal and State Interests in the Wage and Hour Policies of State and Local Government, Properly Struck the Balance in Favor of the States.

In *National League*, the Court considered the question whether "the States' power to determine the wages" they will pay their employees, "what hours those persons will work, and what compensation will be provided . . . [for overtime] are

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[19] Without citing any case where this Court has declined to adjudicate a federalism dispute, Garcia argues that such questions should be left to the political process. Such an unprecedented suggestion shakes the very foundation of our constitutional form of government. The Founders clearly envisioned that the federal judiciary would be the final arbiters in disputes between the States and the federal government over the constitutionality of federal statutes. *E.g.*, *Federalist No. 39* (Madison) at 256 ("in controversies relating to the boundary between the two jurisdictions [state and federal], the tribunal which is ultimately to decide, is to be established under the general Government"); *Federalist No. 78* (Hamilton) at 524 (courts' duty "must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."); *see also* IV *Debates* 485 (Van Buren) ("Not only are the acts of the national legislature subject to [the Supreme Court's] review, but it stands as the umpire between the conflicting powers of the general and state governments.").

Perhaps the most famous exposition on the justiciability of conflicts between federal law and the Constitution is reflected in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). There the Court noted that "in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but only those which shall be made in pursuance of the constitution, have that rank." *Id.* at 180. The Court concluded that "it is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177, and that the proposition "[t]hat a case arising under the Constitution should be decided without examining the instrument under which it arises . . . is too extravagant to be

'functions essential to separate and independent existence. . . .'" 426 U.S. at 845.[20] The Court observed that the FLSA "directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose" and noted that "[t]his congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs." *Id.* at 849. The Court stated that the FLSA will "significantly alter or displace the States' abilities to structure employer-employee relationships in . . . areas . . . typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851, and concluded that "Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made," *id.* at 855.

Justice Blackmun joined the majority's opinion and elaborated upon his understanding that the Court "adopt[ed] a balancing approach . . . ." *Id.* at 856. Under this approach, the federal interest in FLSA regulation was balanced against the state interest in being free to make essential employment decisions. SAMTA submits that *National League* properly concluded that the balance tips in favor of the States.[21]

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maintained." *Id.* at 179. *See also INS* v. *Chadha*, 103 S. Ct. 2764, 2779 (1983); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871) ("the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress"). Compelling evidence of the invalidity of Garcia's argument comes from the wealth of cases cited in this brief in which this Court *has* exercised its jurisdiction to resolve federalism challenges to acts of Congress.

[20] As noted in SAMTA's opening brief (p. 15 n.10), the Court's "separate and independent existence" test is irrelevant in determining whether an *activity* is traditional, but rather goes to the question whether the particular federal regulatory scheme unconstitutionally impairs state choices that are essential to separate and independent existence.

[21] As shown in SAMTA's opening brief (p. 16 n.11), the balancing test is used only to weigh the federal interest in the particular legislation under scrutiny against the state interest. It plays no role in determining whether

Before analyzing these interests, it should be noted that since *National League* this Court has reaffirmed the validity of its holding that Congress cannot constitutionally prescribe minimum wages and overtime compensation for state and local government employees. For example, in *EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1062 (1983), the Court relied upon *National League's* finding that application of the FLSA to the States "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking . . . [which] portend[ed] [a] wide-ranging and profound threat to the structure of State governance." In *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982), the Court cited *National League* for the proposition "that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty," and then remarked that "[i]ndeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *See also White* v. *Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042, 1051 (1983)(Blackmun, J., concurring and dissenting)("The States have a sovereign interest in some freedom from federal interference when hiring state employees.").[22]

1. The States' Interest.

National League accords proper constitutional deference to the role of state and local governments in America today. It cannot be gainsaid that a principal role of state and local

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an activity—*e.g.*, fire, police or transit—is an integral operation in an area of traditional governmental functions.

[22] The holding in *National League* that policy choices regarding wages and hours of state and local government employees is an attribute of sovereignty was foreshadowed by earlier decisions. *See Taylor* v. *Beckham*, 178 U.S. 548, 570-71 (1900) ("It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference . . . ."); *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 547 (1869) ("It may be admitted that the reserved rights of the States, such as the right to . . . employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress.").

governments is to "deliver[] . . . those governmental services which their citizens require." *National League*, 426 U.S. at 847. One need only walk through the streets of our cities to realize the immense burden thrust upon state and local governments in satisfying the demands of their citizens. The States provide protection from crime and disasters; they educate their young; they provide health care for their poor; they tend to the need for sanitation; they provide parks and recreational facilities for use by everyone; and—as in this case—they furnish inexpensive, tax-subsidized mass transit services so that people can go to work and school and attend to their other basic needs.

The stark reality that the obligation to furnish most governmental services to local citizenry has fallen upon the shoulders of state and local governments is evident from the fact that they outspend the federal government on domestic programs.[23] The crucial role of state and local governments in providing public services is also shown by the fact that the number of state and local government employees is more than four times the number of federal civilian employees. *Statistical Abstract 1984*, at 303, tab. 487 (showing that in 1982, there were approximately 13.1 million state and local government employees and 2.9 million federal civilian employees).[24]

No one can contest the fact that in choosing the wage rates and overtime policies that will prevail for their employees, state and local governments are "mak[ing] . . . fundamental . . . decisions" that are part of the "quintessential attribute of sovereignty." *FERC* v. *Mississippi*, 456 U.S. at 761. *See also*

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[23] For example, in 1977, state and local governments made 70% of all direct expenditures for domestic governmental purposes. Advisory Comm'n on Intergov't Rel., *State and Local Roles in the Federal System* 6 (1982).

[24] That state and local government would assume this role is logical in the natural order of human experience. *See Federalist No. 17* (Hamilton) at 107: "Upon the same principle that a man is more attached to his family than to his neighbourhood, to his neighbourhood than to the community at large, the people of each State would be apt to feel a stronger byass towards their local governments than towards the government of the Union . . . ." *See also* 1 McQuillin, *Law of Municipal Corporations* 45 (3d ed. 1971).

EEOC v. *Wyoming*, 103 S. Ct. at 1077 n.5 (Powell, J., dissenting)("the power to determine the terms and conditions of employment . . . is as sovereign a power as any that a State possesses . . . ."). The only way a state can fulfill its fundamental duty to provide services for its citizens is by employing a force of people to deliver the services. Without a workforce, no service—fire, police, transit—could be provided to anyone, and the States would essentially be hollow shells. In hiring and retaining employees, and in allocating their financial resources in the manner they deem most prudent, state and local governments must carefully fashion wage rates and overtime policies that best suit their unique needs and are consistent with their budgetary resources.

The amount of state revenues spent on payroll underscores the importance of local decisionmaking in setting wage and hour policies. In *National League*, it was undisputed that 80% to 85% of state and local government budgets are used for payroll. See Opening Brief of National League of Cities 11; Transcript of Oral Argument (Apr. 16, 1975) 21-22. Application of the FLSA to state and local governments would directly impair their ability to make policy choices regarding the allocation of the great bulk of their financial resources. Such far reaching interference with the essentials of state sovereignty strikes at the very foundation of a state's ability to fulfill its role in the Union by delivering the services that its citizens require.

The States have always been accorded wide latitude in making such policy choices. In *Federalist No. 33*, at 204, Hamilton queried "[w]hat is a power, but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution?" In *Federalist No. 34*, at 209, he observed that "there can be no color for the assertion, that [the States] would not possess means, as abundant as could be desired, for the supply of their own wants, independent of all external control." Hamilton also emphasized that the essential ingredient in any effective government is revenue; in *Federalist No. 31*, at 196, he said,

> Revenue is as requisite to the purposes of the local administrations as to those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. It is therefore as necessary, that the State Governments should be able to command the means of supplying their wants, as, that the National Government should possess the like faculty, in respect to the wants of the Union.

In *National League*, the Court concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented." 426 U.S. at 851. This statement was in keeping with the major thrust of the Court's decision—that the infirmity of the FLSA amendments covering state and local government employees is that they "directly supplant[] the considered policy choices of the States' elected officials" and in effect "forbid such choices . . . ." *Id.* at 848. In *EEOC* v. *Wyoming*, the Court elaborated on this point and observed that the question of impact addressed in *National League* is an "inquiry, essentially legal rather than factual, into the direct and obvious effect of the federal legislation on the ability of the States to allocate their resources." 103 S. Ct. at 1063. According to the Court, the concern in *National League* was not only with present effects, "but also with the *potential* impact of [the] scheme on the States' ability to structure operations and set priorities over a wide range of decisions." *Id.* at 1062 (emphasis added).

Although the decision in *National League*, as well as the briefs filed by the appellants in that case, dramatically illustrate the tremendous effect the FLSA portended for state and local governments, it is more significant that the FLSA's application would straightjacket state and local governments with federally imposed requirements, thereby foreclosing their future ability to structure essential services by making changes in wage and hour policies, as local needs dictate.[25] Furth-

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[25] As reflected in SAMTA's opening brief (p. 15 n.9), it would be extremely difficult to limit drivers to 8-hour shifts "without seriously disrupting service to transit passengers." Peak passenger loads require shifts that range from 8 hours to 8 hours 45 minutes. Due to geographical, traffic and other conditions, schedules simply cannot be designed around an 8-hour shift, just as

ermore, attempts to increase the burdens of the FLSA, although unsuccessful in the past, may prevail in the future, thereby imposing even more crippling obligations on state and local governments. A stunning example of this is a bill that was introduced in the House of Representatives in 1983. In stages, it would have lowered the workweek from 40 to 32 hours for purposes of the overtime obligation, would have required the payment of overtime at double the regular rate and would have prohibited the scheduling of daily shifts of more than 20% of the statutorily mandated regular workweek without the consent of the worker. H.R. 1784, 98th Cong., 1st Sess., 129 Cong. Rec. H775 (1983). By a very conservative estimate, this bill, if enacted, would cost state and local governments at least $16 billion in added payroll costs just for the extra pay employees would receive for working a regular 40-hour workweek.[26] This does not include the substantial additional dollars state and local governments would have to pay for hours worked in excess of 40. Under the bill, employees would have the power to dictate when overtime would be worked and ultimately to restrict their availability to shifts of 6 hours 24 minutes! Such an encumbrance could bring essential governmental services to a standstill.[27]

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exigencies of city life prevent 8-hour scheduling for fire and police services. If SAMTA were forced to conform its operations to the FLSA-mandated 40-hour workweek, the routes and schedules that have been carefully designed and adjusted to accommodate local conditions would require substantial restructuring. Some routes would be dropped; others shortened. Local decisionmaking would succumb to federal regulation.

[26] This estimate was based upon a conservatively assumed average hourly rate for state and local government employees of $6.00 and the further assumption that at least half of all state and local government workers would not be exempt from the FLSA under the white collar exemption for executive, administrative and professional employees. If each employee worked only 40 hours per week, he would be entitled to an additional $6.00 per hour for the eight hours of overtime worked per week, or $2,496.00 more per year. This latter figure, when multiplied times half of the 13,071,000 state and local government employees, *Statistical Abstract 1984*, at 303, tab. 487, produces a figure of more than $16.3 billion.

[27] Other bills to increase the burdens of the FLSA include H.R. 3652, 98th Cong., 1st Sess., 129 Cong. Rec. H5633 (1983) (increasing the minimum wage to $4.15 per hour); H.R. 1784, 97th Cong., 1st Sess., 127 Cong. Rec.

The current financial distress of state and local governments also must be considered. Although demands for new and improved governmental services have increased, local government's ability to finance these services has not kept pace. The situation has been compounded by the federal government's recognition that most government services are properly the responsibility of state and local governments and by its withdrawal of funding. The current dilemma of local government was noted in Gold, *Recent Developments in State Finances*, 36 Nat'l Tax J. 1 (1983):

> State government finances have ridden a rollercoaster during the post-World War II period. First came an enormous multi-decade expansion, which ended in the mid-1970's. This boom was followed by an unprecedented tax-cutting spree in the wake of Proposition 13. We are currently in a third period, one marked by widespread fiscal stress and tax increases. While the outlook for the remainder of the 1980s is fraught with uncertainties, it is clear that states will be playing a more prominent role in our federal system as the federal government pulls back from domestic responsibilities it had assumed over the past two decades.

The proposed federal budget for 1985 reinforces the foregoing observation, for there the Government continued its plan to reduce funding to such local responsibilities as transit, education and sewage treatment. Office of Mgm't & Budget, Exec. Office of the President, *Major Themes & Additional Budget Details Fiscal Year 1985*, at 195, 317, 341-42, 353 (1984).

News journals are replete with stories about the economic woes of our states and cities. For example, the February 14, 1983 issue of *U.S. News & World Report* recites that in New York City "6,300 job slots are being abolished, including 1,000 for police officers and 262 for street cleaners. Officials concede

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H414 (1981) (reducing the workweek for overtime purposes to 35 hours, requiring overtime compensation at double the regular rate and prohibiting mandatory overtime); H.R. 1784, 96th Cong., 1st Sess., 125 Cong. Rec. 1666 (1979) (same); H.R. 11784, 95th Cong., 2d Sess., 124 Cong. Rec. 8001 (1978) (same); H.R. 10130, 94th Cong., 1st Sess., 121 Cong. Rec. 32655 (1975) (boosting required overtime pay to two and one-half times the regular rate).

the reductions will mean dirtier and perhaps less secure streets." *Id.* at 88. The November 28, 1983 edition of the *Wall Street Journal* reports on a National League of Cities' survey in which half of the responding cities replied that they "plan to reduce services this year to pare anticipated deficits" and that "[a]bout 35% expect to reduce municipal employment." *Id.* at 20, col. 2. The September 12, 1983 issue of *U.S. News & World Report* stated that "more than three quarters of the states trimmed 1983 budgets" and that "[n]ineteen states withheld cost-of-living pay raises from employees." *Id.* at 12. The litany of similar articles could go on for pages, and they all would underscore the axiom that the ability of local governments to make their own policy choices in deciding how to spend the 80% to 85% of revenues that are used for payroll purposes is an essential of sovereignty that cannot be impaired by the federal government without jeopardizing, or destroying completely, the integrity of the States.

2. The Federal Interest.

The discussion above, and the text of the *National League* decision and its progeny, demonstrate beyond peradventure that the ability of state and local governments to determine their own wage and hour policies is a "core state function," *see EEOC* v. *Wyoming*, 103 S. Ct. at 1060, which is not only an attribute of sovereignty, but an indispensable component of sovereignty. The federal interest in regulating the wages and hours of state and local government employees withers in comparison to the States' preeminent interest in making their own wage and hour decisions.

Maryland v. *Wirtz*, 392 U.S. at 189-93, shows that Congress had two reasons for adopting the enterprise concept of FLSA coverage, pursuant to which state and local governments were subjected to the FLSA in 1974. One purpose was to eliminate unfair competition; the other was to prevent labor strife. Neither purpose is furthered in any significant way by applying the FLSA to state and local governments.

Significant competition simply does not exist between the public and private sectors with respect to activities encompas-

sed by *National League*.[28] For example, SAMTA is the only urban mass transit system in the San Antonio area. In furnishing a service that is subsidized by local taxes and which the private sector is unable to provide, SAMTA is in competition with no one. Furthermore, even if state and local governments could be considered in competition with the private sector—for example, the police department with private security services—federal regulation of wage and hour policies would not affect the competitive situation. Most essential governmental services are heavily subsidized by local tax dollars, and the States could not realistically raise user charges to the levels of the private sector since this would deprive millions of poor Americans of services essential to their health and welfare. State and local governments are, after all, the last resorts of the poor.

The second purpose for FLSA coverage—elimination of labor strife—similarly has little applicability to state and local governments. Most of the Fifty States prohibit strikes by public employees. *See* Council of State Governments, *Book of the States 1982-83*, at 318-19, tab. 4 (1982). The States accordingly have developed their own method of dealing with labor strife, which substantially lessens any federal interest to be served by "congressionally imposed displacement of state decisions . . . ." *National League*, 426 U.S. at 849. Although illegal strikes are not unknown in the public sector, the States have the capability to handle these matters on their own through disciplinary and legal proceedings, just as the federal government was able to handle the air controllers' illegal strike.

As recognized in *National League*, "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce." 426 U.S. at 854. Although the elimina-

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[28] In fact, activities in which there is substantial competition would probably not be eligible for *National League* immunity since the service provided would be one that the private sector was fully capable of providing as a business enterprise and which therefore would not constitute an "integral operation in areas of traditional governmental functions."

tion of labor strife and unfair competition may be valid reasons to apply the FLSA to the private sector, they simply do not measure up to the compelling need for state and local governments to retain flexibililty in making those fundamental decisions that form the "quintessential attribute of [their] sovereignty."

B. The "Historical" Test Proposed by the Government, and Garcia's Claim That the Tenth Amendment Only Protects the "Enactment and Enforcement of Laws," Are Untenable.

1. The Government (br. 17) contends that the test for *National League* immunity "should be essentially, if not exclusively, an historical one." With one added twist discussed below, the Government merely reiterates the argument it made in its opening brief—that sovereign state functions can be no greater than those historically engaged in by the States.

As SAMTA's opening brief emphasized (pp. 29-33), the Government's historical test would shackle the States to the antiquated world of our forefathers, depriving the States of their ability to make policy choices and structure their activities to meet the changing needs of an evolving society. Not only is the Government's test repugnant to this Court's rejection in *LIRR* of a "static historical view of functions generally immune from federal regulation," 455 U.S. at 686, but it also violates the fundamental principle that ours is a living constitution—one which acknowledges that " '[v]iable local government may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions.' " *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978).

The Government cites no case in which this Court has ever endorsed an historical test in determining which local government activities are insulated from federal regulation. In footnote 6 on page 20 of its supplemental brief, the Government claims that in *New York* v. *United States*, 326 U.S. 572 (1946), "the historical standard appeared to represent the consensus of the Court." This statement is patently erroneous. No mem-

ber of the Court espoused a doctrine that would so hamstring the States. In fact, Justice Frankfurter emphatically expressed the contrary position when he stated the "we decide enough when we reject limitations . . . derived from such untenable criteria as . . . *historically* sanctioned activities of government . . . ." *Id.* at 583-84 (emphasis added). The dissenting justices also shunned a static historical test. *Id.* at 591, 596. In the final analysis, support for the Government's definition of "traditional" is derived solely from its unsupported refrain that it means "historical."

In its supplemental brief (p. 21), the Government has modified its historical test slightly by arguing that Tenth Amendment immunity should be denied "where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area." This arbitrary test finds no support in the decisions of this Court and bears no rational relation to the basic purpose for federalism—protection of the States' "integrity [and] their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975). That the federal government has generally regulated the private sector in the past affords no basis for depriving state and local governments of the flexibility to structure their activities to meet the changing needs of their citizens.

The untenable nature of the Government's position is particularly evident when one considers that the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1982), which was passed in 1935, governs the labor relations practices of virtually all private sector employers, regardless of the type of activity involved.[29] *See* SAMTA's opening brief at 22. Under the Government's historical abstraction, one could argue that no activity which was not "well established as a common governmental function" by 1935 would ever be eligible for Tenth Amendment immunity since by that date the federal government had undertaken to regulate labor relations throughout

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[29] As the court below noted, the NLRA has always exempted the States and their political subdivisions. Gov't J.S. 9a.

the private sector. Such an inflexible standard, one that is more out of step with sound constitutional construction, is hard to imagine. If the Tenth Amendment can arbitrarily be frozen as of 1935, then why not place it in suspended animation as of 1787, when Congress was first vested with power to regulate commerce? Any such suggestion, of course, would be unprecedented since "none would concede that the sovereign powers of the States were limited to those which they exercised in 1787." *New York* v. *United States*, 326 at 596 (Douglas, J., dissenting).

The Government (p. 28) also contends that if its historical test is not adopted, "questions of constitutionality of federal legislation affecting the states would be open to continual judicial reexamination . . . ."[30] The Government fails to realize that an enlightened judiciary responsive to changing conditions is the very essence of our constitutional jurisprudence. This Court is regularly called upon to reexamine earlier decisions and to construe legislation and governmental practices in light of present realities. This is evident in the Eighth Amendment cases discussed in SAMTA's opening brief (p. 30 n.26) and perhaps is best reflected in this Court's landmark decision, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), where the Court discarded its predecessors' conceptions of equal educational opportunities and held that it "must consider public education in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492-93. If the Court were precluded by static historical concepts from harmonizing constitutional jurisprudence with the changing face of America, we would be saddled with archaic rulings from years long passed. *Compare, e.g., Plessy* v. *Ferguson*, 163 U.S. 537 (1896) *with Brown* v. *Board of Education*, 347 U.S. 483 (1954); and *Pace* v. *Alabama*, 106 U.S. 583 (1882) *with McLaughlin* v. *Florida*, 379 U.S. 184, 189-90 (1964) *and Lov-*

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[30] The Government also maintains that the Court should defer to Congress the task of periodically reviewing the federal laws to determine whether statutory change is warranted. Such a rule would amount to abdication of this Court's fundamental responsibility "to say what the law is," *Marbury* v. *Madison*, 5 U.S. at 177, and "to declare all acts contrary to the manifest tenor of the constitution void," *Federalist No. 78* (Hamilton) at 524.

ing v. *Virginia*, 388 U.S. 1 (1967). As eloquently put in *Hurtado* v. *California*, 110 U.S. 516, 529 (1884), "to deny every quality of the law but its age, and to render it incapable of progress or improvement . . . would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

The Government (br. 27-28) repeats the same erroneous argument from its opening brief: that the FLSA was constitutional under *National League* standards when it first was made applicable to certain public transit systems in 1966 because the States supposedly had not generally undertaken to provide transit services by that date, or by 1961, when the FLSA was extended to certain private (but not public) systems. As noted in SAMTA's opening brief (pp. 24 n.17, 28, 35), by 1965, 56% of all transit workers in the United States were employed by publicly owned systems. Furthermore, APTA's opening brief (p. 23 & n.30) shows that long before 1965, many of the nation's larger cities had public transit systems. In San Antonio, the transit system has been publicly owned since 1959.

2. Garcia's contention that *National League* should be limited to the making and enforcement of laws would relegate state and local governments to the role of police states whose sole sovereign duty would be to pass laws and compel obedience. The absolute invalidity of this contention is evident from the Founders themselves. In *Federalist No. 45*, Madison stated that "[t]he powers reserved to the several States will extend to *all* the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the States." *Id.* at 313 (emphasis added). In the same paper, Madison declared that "the states will retain under the proposed Consitution a *very extensive* portion of active sovereignty . . . ." *Id.* at 310 (emphasis added). In *Federalist No. 34*, Hamilton emphasized that states "possess means, *as abundant as could be desired*, for the supply of their own wants, independent of all external control." *Id.* at 209 (emphasis added). *National League* itself stressed that state sovereignty encom-

passes the "dual functions of administering the public law *and furnishing public services.*" 426 U.S. at 851 (emphasis added).

That the furnishing of services is protected by federalism and the Tenth Amendment is underscored by the fact that police protection—which Garcia would exempt—is itself a service. Although Garcia has attempted to support his ill-conceived limitation with statistics showing expenditures for public schools and hospitals (br. 39-40), the same observations can be made about law enforcement. During 1981-82, state and local governments spent approximately $27.8 billion on "police protection," "correction," and "protective inspection and regulation." Bureau of Census, U.S. Dep't of Commerce, *Governmental Finances in 1981-82*, at 33, tab. 11 (1983). This was equivalent to the $29.6 billion they spent on hospitals, and was substantially higher than the $14.9 billion spent on sanitation (including sewerage), $6.9 billion on fire protection, $7.4 billion on parks and recreation, and $10.7 billion on public health; the greatest expenditures were for education, highways and public welfare. *Id.* During the same period, state and local governments spent $11 billion on mass transit. *Id.* at 61, tab. 19.[31]

3. SAMTA's opening brief demonstrated in detail that publicly owned transit systems must be exempt under *National League*, whether immunity is measured under the guidelines of *LIRR*, or through comparison of transit with other activities exempted in *National League*, or on the reality that transit is an integral component of the traditional activity of providing and maintaining streets and highways for public transportation, or on the fact that the States regard transit as an integral part of their governmental activities. Another way to determine what is traditional is by considering whether the particular activity could be effectively provided by the private sector if state involvement ceased and whether the States engage in the activity for profit. This test is consistent with previous decisions of this Court.

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[31] As noted in SAMTA's opening brief (pp. 33-34), Congress has on several occasions emphasized the reality that transit and other vital services are as essential as police protection.

In *South Carolina* v. *United States*, 199 U.S. 437 (1905), the Court held that the federal government could exact license taxes on state-owned liquor stores. The Court noted that the liquor business was operated for profit, *id.* at 454, and concluded that the tax immunity doctrine "is limited to those ["state agencies and instrumentalities"] which are of a strictly governmental character, and does not extend to those which are used by the state in the carrying on of an ordinary private business." *Id.* at 461. This same rationale is evident in *Allen* v. *Board of Regents*, 304 U.S. 439 (1937), in which the Court ruled that the federal government could impose a tax on athletic events held at publicly owned universities. The Court held that the "immunity implied from the dual sovereignty recognized by the Constitution does not extend to business enterprises conducted by the States for gain." *Id.* at 453.

In *New York* v. *United States*, 326 U.S. 572 (1946), the Court held that the federal government can tax mineral waters sold by the state. Justice Frankfurter noted that "there is a constitutional line between the State as government and the State as trader . . . [and] 'if a state *chooses* to go into the business of buying and selling commodities, . . . the exercise of [that] right is not the performance of a governmental function'. . . ." *Id.* at 579 (emphasis added). The Court also remarked that the state was "engaged in a business enterprise in which the State sells mineral waters in competition with private waters." *Id.* at 581.

The principle that the Tenth Amendment does not protect state activities that are for profit or which can be effectively provided by the private sector has received recognition in recent decisions of this Court. In *Employees* v. *Missouri Department of Public Health & Welfare*, 411 U.S. 279, 284 (1973), the Court, in extending Eleventh Amendment protection to a state hospital, noted that such hospitals "are not operated for profit . . . ." Subsequently, in *Edelman* v. *Jordan*, 415 U.S. 651, 695 (1974), Justices Marshall and Blackmun, dissenting, stated that "in launching a profitmaking enterprise, a 'State leaves the sphere that is exclusively its own.' " (quoting *Parden* v. *Terminal Railway*, 377 U.S. 184, 196 (1964)). A similar rationale appears in Chief Justice Burger's concurring opinion

in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 (1978), in which he stated that "[t]his case turns, or ought to, on the District Court's explicit conclusion . . . that '[t]hese plaintiff cities are engaging in what is clearly a business activity . . . in which a profit is realized.' "[32] Further support for this test appears in the dissenting opinion of Justices Powell, Brennan, White and Stevens in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980): "[o]ne distinction between a private and a governmental function is whether the activity is supported with general tax funds . . . or whether it is financed by the revenues it generates." *Id.* at 452 n.3. The opinion distinguished "integral operations in areas of traditional governmental functions" where the "Commerce Clause is not directly relevant" from situations where the "State enters the private market and operates a commercial enterprise." *Id.* at 449-50.

By focusing on whether an activity is operated for profit and whether it could be effectively provided by the private sector if the States withdrew, the Court gives due recognition to the flexibility state and local governments need in order to deliver "those governmental services which their citizens require." *National League*, 426 U.S. at 847. At the same time, the federal and state governments are afforded a workable yardstick from which to measure the limits of federal Commerce Clause power over the States.

As documented in SAMTA's opening brief, publicly owned mass transit systems are clearly entitled to *National League* protection under this standard. Urban mass transit services

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[32] In *Lafayette*, the Chief Justice observed that "a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause." 435 U.S. at 422. As SAMTA's opening brief (p. 27 n.23) shows, this quotation apparently was in reference to common carriers by rail. The decision in *LIRR* demonstrates that railroads—which are part of the national rail system requiring uniform regulation, which have been subject to comprehensive federal regulation for more than a century, and which have not traditionally been subject to state regulation—are a unique subject for Commerce Clause regulation. Certainly, neither transit nor any of the activities mentioned in *National League* are part of a national network, nor have they been subjected to comprehensive federal regulation, while all have traditionally been regulated by the States.

are provided almost exclusively by the public sector.[33] Transit is heavily subsidized by local taxes and is not operated for profit, but instead exists as one of the essential services necessary to the health and well-being of our urban areas—a service which would not exist if the States did not provide it.

C. Political Subdivisions Cannot Be Separated from the States for Purposes of the Tenth Amendment.

In *National League*, the Court expressly extended FLSA immunity to the States and their political subdivisions. 426 U.S. at 855 n.20. Garcia maintains that *National League* should apply only to state governments and should not embrace their political subdivisions. The Government does not join in this contention. As shown below, it is without merit.

In most areas of constitutional jurisprudence, this Court has treated the States and their political subdivisions identically for purposes of the Tenth Amendment. For example, in *United States* v. *Baltimore & Ohio Railroad*, 84 U.S. (17 Wall.) 322 (1873), a tax case, the Court made clear that a city, like a state, is entitled to federalism protection against overreaching federal legislation:

> A municipal corporation like the city of Baltimore is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state.

Id. at 329. A similar rationale was articulated by the Court in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 577 (1930) in which the Court invalidated a federal tax assessed

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[33] SAMTA is not suggesting that an activity must be within the exclusive domain of state and local governments. All of the activities listed in *National League*, including even police protection, have analogs in the private sector. However, no one could assert that the private sector would be able to step in and provide these services if the States were no longer involved. For example, if state and local governments closed all public schools, millions of Americans, particularly the poor, would go without an education. Similarly, if the States eliminated mass transit as one of the services they provide, transit would become a relic of the past because the private sector simply cannot provide transit services profitably.

against the City of Westfield on the purchase of a motorcycle. Other cases involving the federal tax power have reached similar results. *E.g.*, *Brush* v. *Commissioner*, 300 U.S. 352 (1936)(salary of chief engineer for city bureau of water supply not taxable); *Willcuts* v. *Bunn*, 282 U.S. 216, 225 (1930)(tax on obligations of state's "political subdivisions falls within the constitutional prohibition as a tax upon the exercise of the borrowing power of the state"); *National Life Insurance Co.* v. *United States*, 277 U.S. 508, 521 (1928)("United States may not tax state or municipal obligations"). The same principle was followed in invalidating a federal bankruptcy statute, as applied against a political subdivision of the State of Texas. *Ashton* v. *Cameron County Water Improvement District No. 1*, 298 U.S. 513, 527-28, 532 (1936). Similarly, in *Gilman* v. *City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1866), the Court quoted the Tenth Amendment and held that the City of Philadelphia had the right, notwithstanding the provisions of the Commerce Clause, to construct a bridge across a navigable river for the public convenience.

The Court has also consistently held that the States and their political subdivisions are covered by other parts of the Constitution. *See, e.g.*, *United Building & Construction Trades Council* v. *Mayor of Camden*, 104 S. Ct. 1020, 1026 (1984) (Privileges and Immunities Clause); *Waller* v. *Florida*, 397 U.S. 387, 392, 395 (1970)(Fifth and Fourteenth Amendments); *Avery* v. *Midland County*, 390 U.S. 474, 479-81 (1968) (Equal Protection Clause); *Schneider* v. *Town of Irvington*, 308 U.S. 147, 160 (1939)(First and Fourteenth Amendments); *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U.S. 207, 216-17 (1903) (Contract Clause).

The wisdom of not distinguishing between the States and their political subdivisions for Tenth Amendment purposes—particularly where a statute, such as the FLSA, regulates employment policies—becomes particularly evident when one considers that the great majority of governmental services in the United States are furnished by the political subdivisions of the States. In 1982, there were 82,290 political subdivisions in

the Fifty States.[34] *Statistical Abstract 1984*, at 272, tab. 447. During the same year, the States and their political subdivisions had a combined total of 13,071,000 employees, of which 3,747,000 (28.7%) worked for state governments, and 9,324,000 (71.3%) worked for local government. *Id.* at 303, tab. 487. With regard to police protection—which Garcia would exempt under *National League*—state and local governments had 599,000 such employees, of which 524,000 (87.5%) worked for local government. *Id.* at 304, tab. 489. These figures show that restriction of *National League*'s principles to state governments would place the great majority of policy choices regarding wages and hours for public employees beyond the pale of the Tenth Amendment and would essentially eviscerate the Court's holding.

The only authorities cited by Garcia for his novel suggestion arose under the Eleventh Amendment or the federal antitrust laws. Neither line of cases warrants a change in *National League*. The Eleventh Amendment merely precludes private suits in federal courts against "one of the United States." At best, it only indirectly protects a state from the effects of federal legislation, and it does not relate to the power of the federal government directly to control the internal operations of "the States and their political subdivisions . . . in . . . deliver[ing] those governmental services which their citizens require." *National League*, 426 U.S. at 847.

Antitrust cases, such as *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), are likewise inapposite. In *Boulder*, the Court held that a city did not enjoy antitrust immunity under the "state action doctrine" for a city ordinance that restrained competition among cable television companies. The question in *Boulder* is not remotely similar to the issue in *National League*—the extent to which the federal government can regulate essential services of state and local governments. In fact, the case upon which *Boulder* was premised, *City of*

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[34] Texas alone had 4,192 political subdivisions. Tex. Advisory Comm'n on Intergov'tl Rel., *Trends in Texas State & Local Government Finance* 35 (1984).

Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), stated that it was "difficult to see how *National League of Cities* is even tangentially implicated." *Id.* at 412 n.42.

Even if the *Boulder* rationale were applicable to the Tenth Amendment principles in *National League*, SAMTA would meet the test. In *Boulder*, the Court held that a political subdivision enjoys antitrust immunity if it is engaged in "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. . . ." 455 U.S. at 52. SAMTA provides urban mass transit services by mandate of the State of Texas. *See* Tex. Rev. Civ. Stat. Ann. arts. 1118x, 6663b, 6663c (quoted in part in the Appendix to SAMTA's opening brief). In fact, under article 1118x, § 3(a), the principal city in a metropolitan area is required "to institute proceedings to create a rapid transit authority" if 5000 qualified voters file a petition. Section 6A then requires that services be extended to adjoining areas upon vote of their residents.

CONCLUSION

SAMTA respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted,

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